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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 643

FORD MOTOR COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

No. 644

COMMERCIAL INVESTMENT TRUST CORPORATION, COMMERCIAL INVESTMENT TRUST, INC., UNIVERSAL CREDIT CORPORATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law are found at R. 157–161.

JURISDICTION

The decree of the District Court was entered on July 25, 1946 (R. 161–162). Petition for

appeal in No. 643 was filed on September 17, 1946 (R. 162), and allowed on September 18, 1946 (R. 169). Petition for appeal in No. 644 was filed on September 16, 1946 (R. 206), and allowed on September 18, 1946 (R. 213–214).

The jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Sec. 29, and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C., Sec. 345. Probable jurisdiction was noted on November 12, 1946 (R. 222–223).

QUESTIONS PRESENTED

In 1938, three indictments were returned against the three largest motor car manufacturers, Ford, Chrysler, and General Motors, and their respective affiliated finance companies, charging violations of the Sherman Act. Each indictment charged that the factory and its affiliated finance company had conspired to force the dealers selling cars of such manufacturer to use the financing facilities of the affiliated finance company at both wholesale and retail. The effect of such practices was to prevent the dealers, who were not agents but independent contractors, from exercising an independent choice of finance mediums and to discriminate against non-affiliated finance companies competing for the dealers' business.

Ford and Chrysler settled by submitting to decrees which enjoined the coercive and discriminatory practices and prohibited them from owning an interest in a finance company. General Motors elected to stand trial. In order that Ford and Chrysler should not be placed at a competitive disadvantage certain provisions of the decrees, while presently effective, were subject to the following conditions:

1. All of the injunctive features were to be suspended unless the Government convicted the General Motors Group in the then pending criminal case by January 1, 1940. Conviction was secured on November 16, 1939. This conviction was sustained on appeal. Certain of the injunctive features, including those relating to factory recommendation and endorsement of a particular finance company, as well as that relating to joint solicitation of dealers by agents of the factory and a factory-preferred finance company, were to be suspended unless the trial court in instructing the jury in the *General Motors* criminal case included such activities among those agreements, acts, and practices which would justify the return of a general verdict of guilty. Appellants filed motions seeking suspension of these particular provisions on the ground that the trial court had instructed the jury that such conduct was lawful and proper.

2. The bar against affiliation was to be lifted unless the Government succeeded in divorcing General Motors Corporation from its affiliated finance company by January 1, 1941. Suit was filed but was not concluded by that date. Annual extensions of the bar against Ford's affiliation were secured by consent until January 1, 1946. At that time the Government filed a motion to extend the time for another year, or until January 1, 1947, and Ford filed a motion asking that the bar be lifted permanently.

The District Court, after hearing, denied appellants' motions to suspend the two injunctive provisions of the decree. It granted the Government's motion to extend the bar against affiliation to January 1, 1947, and denied appellant Ford's motion to lift the bar permanently. The question presented, therefore, is whether the District Court was correct in so ruling.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or

conspiracy hereby declared to be illegal shall be guilty of a misdemeanor * * *, (15 U. S. C., Sec. 1.)

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *. (15 U. S. C., Sec. 2.)

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations * * *. (15 U. S. C., Sec. 4.)

STATEMENT

PRIOR PROCEEDINGS IN THE CASE

A brief review of the Government's antitrust proceedings directed to the elimination of trade restraints in the automobile financing field is essential to a clear presentation of the issues now before this Court. On May 27, 1938, three indictments[1] charging violations of the Sherman Act

[1] The three indictments were identical except for the parties named as defendants. The indictment against the General Motors Group is found at R. 135–151.

were returned in the District Court of the United States for the Northern District of Indiana, South Bend Division. One was against appellants here, Ford Motor Company (hereinafter referred to as Ford); Commercial Investment Trust Corporation, Commercial Investment Trust, Inc., and Universal Credit Corporation (hereinafter collectively referred to as CIT); one against Chrysler Corporation and certain affiliated finance companies; and one against General Motors Corporation and certain affiliated finance companies.

Each indictment charged the respective defendants with conspiring to monopolize the business of financing the sale of automobiles, both new and used (R. 144), by forcing and inducing dealers handling the cars of the respective manufacturers to use the financing facilities, both in making wholesale purchases and retail sales, of the finance companies affiliated with the respective manufacturers (R. 144–149). Each indictment charged that because of the high unit price of cars, as well as the manufacturer's requirement that all cars be paid for in cash before shipment to the dealers, large sums of money were regularly and continuously required to finance purchases by dealers (R. 138); and that large sums of money were necessary also to permit retail purchasers to buy cars on a time sales basis (R. 141).

Among the means alleged to have been used to compel dealers to use such financing services

were: cancellation of dealers' contracts to sell cars and threats to cancel such contracts; the making of such contracts for a period of one year only subject to cancellation on short notice and without cause; conditioning the making of such contracts on the dealer's promise to use the financing facilities of the factory-affiliated finance company; discriminating against non-cooperative dealers by shipping cars which were not ordered during periods of overproduction and refusing to ship cars during periods of short supply, shipping cars of different type, style, and design from those ordered, shipping excessive quantities of parts and accessories; advertising, endorsing, recommending, and promoting the financing facilities of the factory-affiliated finance company; and using any and all other means deemed necessary (R. 144–149). As a result of such practices the dealers were deprived of a free choice of finance companies, even though they were not agents of the factory but were independent contractors.[2]

[2] In affirming the conviction of the General Motors Group, the Seventh Circuit Court of Appeals in *United States* v. *General Motors Corporation*, 121 F. (2d) 376, certiorari denied, 314 U. S. 618, said: "These dealerships constitute independent economic units with an invested capital owned by the dealers" (p. 386). In speaking of factory control of such dealers the court said that "The inevitable conclusion on this record is that although General Motors Corporation and General Motors Sales Corporation have rejected the dealer-agency system, they seek nevertheless to control and supervise the business operations of the 15,000 independent dealer-purchasers" (p. 400).

In addition, the indictments charged that the factory-affiliated or factory-favored finance companies were afforded certain privileges that were denied to independent finance companies, such as space in the plants, factories, and offices of the respective manufacturers; information relating to the purchase, sale, transportation, and delivery of cars to dealers; instruments relating to security in connection with the financing, purchase, and sale of cars; the direct transfer of title of cars to such finance companies before shipment from the factory (R. 140, 147). Availability of such facilities placed the factory-favored finance companies in a preferred position with respect to competition with independent finance companies.

As a result of the coercion imposed upon dealers, as well as the discriminations directed against the independent finance companies, the factory-favored finance companies enjoyed a substantial monopoly of both the wholesale and retail time sales finance business of the several dealer organizations (R. 144). Independent finance companies and banks were deprived of any substantial participation in such business, since Ford, Chrysler, and General Motors manufactured approximately 90 per cent of all cars sold (R. 150).

THE DECREES ENTERED ON NOVEMBER 15, 1938

On November 15, 1938, the indictments in the Ford and Chrysler cases were dismissed, civil suits were ~~submitted~~ substituted therefor (R. 1–13), and consent

judgments entered (R. 18–41).[3] The decrees had a dual purpose. They were designed to afford the dealers a free choice in the selection of financing mediums for both wholesale and retail financing. In addition, they sought to create an opportunity for competition among finance companies. To achieve such ends the decrees enjoined all forms of pressure and coercion formerly imposed upon the dealers (R. 20–32); terminated the affiliation theretofore existing between the factories and the factory-affiliated or factory-favored finance companies (R. 34), and enjoined discriminations formerly imposed against independent finance companies (R. 21–23). Further, a so-called "code of fair competition" was set up under which any finance company registering under the plan was to agree to eliminate harsh collection methods formerly employed against purchasers of low-priced cars (R. 23–29).[4]

The General Motors Group[5] proposed no acceptable plan for settlement and stood trial. In

[3] The civil suits contained allegations identical with the allegations in the indictments (Compare the General Motors indictment (R. 135–151) with the Ford complaint (R. 1–13)). The decrees in both the Ford and Chrysler suits were substantially identical.

[4] No finance company has ever registered under either the Ford or Chrysler decree.

[5] This Group consisted of the manufacturer, General Motors Corporation; the selling organization, General Motors Sales Corporation; and a finance company, General Motors Acceptance Corporation. The latter two concerns are wholly-owned subsidiaries of General Motors Corporation (R. 137–138).

order that Ford and Chrysler be not placed in a position of competitive disadvantage with the General Motors Group, the decrees in the *Ford* and *Chrysler* cases contained two provisions in the form of conditions subsequent under which certain clauses were to be suspended or were to become inoperative unless and until substantially identical relief was obtained against the General Motors Group. The decrees provided that the Government's litigation against the General Motors Group was to be substituted for the test of the issues in the *Ford* and *Chrysler* cases, and that the prohibitions in those decrees should be adjusted, from time to time, to conform with the adjudications made and the results achieved in the proceedings against the General Motors Group (R. 34–38).

Paragraph 12a (1) of the Ford decree provided that unless the Government secured a judgment of conviction against General Motors Corporation and General Motors Acceptance Corporation in the then pending criminal case, or in any further proceeding initiated by reindictment of General Motors Corporation for the same alleged acts, every provision of the decree would be suspended until such time as the restraints and requirements in terms substantially identical with those imposed by the Ford decree were imposed upon General Motors Corporation and General Motors Acceptance Corporation either by consent decree, or by final decree not subject to further review, or

by a decree of such court which, although subject to further review, continues effective (R. 35).

Paragraph 12a (2) of the Ford decree provided that a general verdict of guilty returned against the General Motors Group in the then pending criminal action, followed by entry of judgment thereon, shall be a determination of the illegality of any agreement, act, or practice of the General Motors Group which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty (R. 35). Paragraph 12a (2) provided further that the determination in such manner of the illegality of any agreement, act, or practice of the General Motors Group shall (for the purpose of clause 12a (3) of the decree) be considered as the equivalent of a decree restraining the performance by the General Motors Group of such agreement, act, or practice (R. 36).

Paragraph 12a (3) of the Ford decree provided that after entry of a judgment of conviction against the General Motors Group in the then pending criminal action, the Court, upon application of the parties, will suspend the injunctions contained in sub-paragraphs (d) to (f) and (h) to (l) of Paragraph 6 and sub-paragraphs (a), (c), and (d) of Paragraph 7, to the extent that they have not been imposed and until they shall be imposed, either by consent, or by final decree not subject to further review, or by a decree which, although subject to further review, continues

effective, or *by the equivalent* of such a decree as defined in Paragraph 12a (2) (R. 36–37).[6]

On November 16, 1939, a general verdict of guilty was returned against the General Motors Group in the criminal case, followed by entry of judgment thereon on November 17, 1939.[7] The judgement of conviction was sustained on appeal.[8]

The second condition subsequent related to the bar against affiliation. Paragraph 12 of the Ford decree enjoined Ford from purchasing the securities of any finance company (R. 34). It provided further that the bar against affiliation would be lifted unless the Government succeeded in divesting General Motors Corporation of its ownership and control of its own finance company, General Motors Acceptance Corporation, by January 1, 1941. The Government filed a civil suit against these two concerns, seeking divestiture, on October 4, 1940. The time limit provided for in Paragraph 12 was not met. Annual extensions

[6] Such, *equivalent* was defined in paragraph 12a (2) as the trial court's instructions to the jury in the then pending criminal case against the General Motors Group that the acts or practices enjoined by sub-paragraphs (d) to (f) and (h) to (l) of Paragraph 6 and sub-paragraphs (a), (c), and (d) of Paragraph 7, constituted a proper basis for the return of a general verdict of guilty against the General Motors Group (R. 35–36).

[7] *United States* v. *General Motors Corporation, et al.*, Cr. No. 1039, N. D. Ind.

[8] *United States* v. *General Motors Corporation, et al.*, 121 F. (2d) 376, certiorari denied, 314 U. S. 618; rehearing denied, 314 U. S. 710.

were secured by consent of the parties until January 1, 1946 (R. 42–65), at which time Ford refused to extend for another year.

THE MOTIONS FOR MODIFICATION

On December 31, 1945, the Government filed a motion seeking an extension of the bar against affiliation until January 1, 1947 (R. 66–72.)[8a]

On May 4, 1946, appellant Ford Motor Company filed a motion (R. 76–91), seeking modification of the Final Decree in two particulars. It sought an order permitting Ford to acquire ownership, control, or an interest in an automobile finance company. In addition, it sought a suspension of sub-paragraphs (i) and (k) of Paragraph 6 of the decree until such time as such provisions are imposed in substantially identical terms upon General Motors Corporation, and a suspension of sub-paragraph (d) of Paragraph 7

[8a] Although the motion sought extension of the bar against affiliation only for the period from January 1, 1946, to January 1, 1947, we think it clear that the case is not moot. On December 27, 1946, the Government filed a motion in the District Court to extend the bar against affiliation from January 1, 1947, to January 1, 1948. (*United States* v. *Ford Motor Company*, Civil No. 8, N. D. Ind.). At the request of the parties, hearing on this motion has been postponed pending the outcome of the appeal in the case at bar. Obviously this is a situation which arises annually. The mere fact that the period for which the particular extension is sought has passed does not render the case moot under the doctrine announced by this Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516.

until such time as such provisions are imposed upon General Motors Acceptance Corporation. It also sought such modification of sub-paragraph (e) of Paragraph 6 as would be necessary to permit conduct now enjoined by sub-paragraphs (i) and (k) of Paragraph 6.

Appellant finance companies also filed a motion (R. 187–199) on May 4, 1946, seeking the identical relief under Paragraphs 6 and 7 of the decree. They did not join in Ford's motion to lift the bar against affiliation.

Paragraph 6 (i) of the decree enjoins Ford from arranging with any finance company that an agent of each of them shall together be present with any dealer or prospective dealer for the purpose of influencing such dealer to patronize that finance company (R. 23).[9] Paragraph 6 (k) of the decree prevents Ford from recommending, endorsing, or advertising any particular finance company to a dealer or to the public (R. 30). Paragraph 7 (d) is the counterpart of Paragraph 6 (i), in that it enjoins appellant finance companies from arranging or agreeing with Ford that an agent of Ford and an agent of appellant finance companies will jointly solicit a dealer for the purpose of influencing such dealer to patron-

[9] A proviso clause in Paragraph 6 (i) does permit such joint visits for the purpose of affording special financing facilities or services to a dealer, and permits such finance company exclusive privileges for a reasonable period of time (R. 23).

ize appellant finance companies (R. 32). Paragraph 6 (e) enjoins Ford from adopting any plan or procedure for the wholesale or retail financing of cars which will afford any particular finance company a competitive advantage in securing dealer patronage (R. 21–22).

ACTION TAKEN BY THE COURT BELOW

The District Court denied appellants' motions to suspend Paragraphs 6(i), 6(k), and 7(d) of the decree; denied appellant Ford's motion to modify Paragraph 12 in such way as to permit Ford to purchase an interest in a finance company; and granted the Government's motion under Paragraph 12 which sought extension of the bar against affiliation to January 1, 1947 (R. 161–162).

As to appellants' motions to suspend Paragraphs 6(i), 6(k), and 7(d), the District Court found:

> (1) That under the decree, Paragraphs 6(i), 6(k), and 7(d) were to be suspended in the event of failure of the Government to secure general verdicts of guilty against General Motors Corporation, General Motors Acceptance Corporation, and others, in a then pending criminal anti-trust proceeding by January 1, 1940 (Finding No. 5) (R. 158);
>
> (2) That general verdicts of guilty were obtained against General Motors Corporation, General Motors Acceptance Corpora-

tion, and others, on November 17, 1939, and that such general verdicts were sustained on appeal (Finding No. 6) (R. 159);

(3) That the trial court in its instructions to the jury in the criminal proceedings against General Motors Corporation and others, held that the agreements, acts, and practices enjoined in Paragraphs 6 (i), 6 (k), and 7 (d) of the Ford decree herein, among others, constituted a proper basis for the return of a general verdict of guilty (Finding No. 7) (R. 159);

(4) That under Paragraph 12a (2) of the Ford decree herein, the general verdict of guilty in the *General Motors* case, under the instructions to the jury by the trial court, is equivalent to a decree restraining the performance by General Motors Corporation of such agreement, acts, or practices as are enjoined by Paragraphs 6 (i), 6 (k), and 7 (d) and other paragraphs of the decree (Finding No. 8) (R. 159);

(5) That the prohibitions contained in Paragraphs 6 (i), 6 (k), and 7 (d) of the Ford decree have been imposed in substantially identical terms upon General Motors Corporation and General Motors Acceptance Corporation as a result of the general verdict of guilty against them under proper instructions from the trial court in accordance with the provisions of Paragraph 12a (2) of the decree (Finding No. 9) (R. 159);

(6) That respondents are not laboring under any competitive disadvantage with General Motors Corporation and General Motors Acceptance Corporation in the manufacture, sale, and financing of Ford cars by virtue of the prohibitions contained in Paragraphs 6 (i), 6 (k), and 7 (d) of the Ford decree, and offered no evidence showing competitive disadvantage (Finding No. 10) (R. 159).

The District Court concluded as a matter of law:

(1) That under Paragraph 12a (2) of the decree, general verdicts of guilty against General Motors Corporation and others in the criminal antitrust case, under proper instructions from the trial court, must be considered the equivalent of a decree against General Motors Corporation enjoining the performance by General Motors Corporation of any agreements, acts, or practices which the trial court, in its instructions to the jury, held to be a violation of the Sherman Act (Conclusion of Law No. 2) (R. 160);

(2) That under Paragraph 12a (3) of the Ford decree, the injunctions imposed by Paragraphs 6 (i), 6 (k), and 7 (d), among others, are not to be suspended if the equivalent of a decree, as set out in Paragraph 12a (2), is secured against General Motors Corporation (Conclusion of Law No. 3) (R. 160).

As to the motion of the Government to extend the bar against affiliation for another year, or

until January 1, 1947, as well as to appellant Ford's motion to be relieved permanently of such bar, the District Court found:

(1) That the purpose of the second unnumbered paragraph of paragraph 12 of the Ford decree was not only to protect Ford from the competitive disadvantage that might result from continued ownership of General Motors Acceptance Corporation by General Motors Corporation in the event the Government's civil suit for divestiture against General Motors Corporation and General Motors Acceptance Corporation was delayed, but also to give Ford an opportunity to defend itself on the question of affiliation, after the time limit set forth in such paragraph had expired (Finding No. 1) (R. 158);

(2) That the Government's suit to divest General Motors Acceptance Corporation from General Motors Corporation is still pending in the District Court, and has not been reached for trial, but the Government has proceeded diligently and expeditiously in such suit (Finding No. 2) (R. 158);

(3) That the decree provided for a termination of the bar against affiliation, if the civil suit for divestiture against General Motors Corporation and General Motors Acceptance Corporation was not concluded successfully by a court of last resort by January 1, 1941 (Finding No. 11) (R. 159);

(4) That the provisions of Paragraph 12 of the decree relating to the bar against affiliation were framed upon the basis that the ultimate rights of the parties thereunder would be determined by the Government's civil suit to divest General Motors Acceptance Corporation from General Motors Corporation (Finding No. 13) (R. 160);

(5) That time was not of the essence with respect to the lapse of the bar against affiliation (Finding No. 14) (R. 160);

(6) That Ford has offered no proof that further extension of the bar against affiliation will place it at a competitive disadvantage with General Motors Corporation (Finding No. 15) (R. 160);

(7) That further extension of the bar against affiliation until January 1, 1947, will not impose a serious burden upon Ford, and will not place Ford at a competitive disadvantage as regards General Motors Corporation (Finding No. 16) (R. 160).

On the bar against affiliation the District Court concluded as a matter of law:

(1) That the purpose and intent of Paragraph 12 was to provide that the test of the permanency of the bar against affiliation was to abide the outcome of the civil antitrust suit against General Motors Corporation, and that the time clause was subsidiary to such main purpose (Conclusion of Law No. 4) (R. 161);

(2) That the purpose and intent of the decree will be achieved if Ford is given the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such plan is necessary to prevent Ford from being placed at a competitive disadvantage during the pendency of the Government's civil litigation against General Motors Corporation, et al. (Conclusion of Law No. 5) (R. 161).

SUMMARY OF ARGUMENT

I

In the criminal proceedings against the General Motors Group the trial court correctly instructed the jury that if, upon a consideration of the entire charge in the indictment and of all of the evidence, it thought that the dealers had been coerced to use the financing facilities of the factory-owned finance company, the jury could properly return a general verdict of guilty. The trial court's charge to the jury was sufficiently broad to include, as a means of coercion, recommendation and endorsement by the factory of the financing services of its affiliated finance company as well as joint visits to the dealers by agents of both companies.

The trial court's charge to the jury must be construed in its entirety and not in isolation. Certain portions of the charge cannot be isolated

and construed separately and apart from their context. The trial court did not instruct the jury that any particular agreement, act, or practice constituted merely exposition, persuasion, or argument and hence was lawful. The court did instruct that if, upon a consideration of the entire charge in the indictment and the evidence, the jury decided that the agreements, acts, and practices constituted merely exposition, persuasion, or argument, they should acquit, but that if the jury found that such conduct constituted coercion, they should convict. Such was an issue of fact which the trial court properly left for determination by the jury.

In an attempt to clarify the meaning of the word "coercion," the court did compare the meaning of that term with the meaning of the terms "exposition," "persuasion," and "argument." That is all that the court did. Under such instructions the jury's general verdict of guilty was a determination that a sufficient number of the allegations in the indictment had been established by the evidence to constitute coercion, and not merely exposition, persuasion, or argument. Since a substantial part of the evidence introduced at the trial related to joint solicitation of the dealers by representatives of the factory and the affiliated finance company who recommended and urged that the dealers use the services of the

factory-affiliated finance company, it is reasonable to assume that such evidence played an important part in the return by the jury of a general verdict of guilty. The instructions given were adequate to include recommendation and endorsement as well as joint solicitations.

The precarious contractual position occupied by the dealers in relation to the manufacturer, as well as their notoriously weak economic condition, make them peculiarly susceptible to the slightest pressure from the factory. Under such circumstances the practice of the factory in recommending a particular finance company, as well as the practice of joint solicitation by agents of the factory and a favored finance company, violate the Sherman Act whether they be considered standing alone or as means to further an illegal purpose.

Where provisions of a decree are to be suspended in the event those enjoined by it are placed in a position of competitive disadvantage, it is incumbent upon those desiring to be freed from the injunction to produce convincing proof of the asserted competitive disadvantage. No such proof was offered here.

II

The court below, in refusing to grant appellant Ford's motion to lift permanently the bar against

affiliation with a finance company and in granting the Government's motion for extension of the bar, properly exercised the discretion vested in it as a court of equity. In *Chrysler Corporation* v. *United States,* 316 U. S. 556, this Court affirmed a similar ruling by the district court in a companion suit involving identical decree provisions.

Ford made no showing in the court below that it had any present or future intention of acquiring an interest in a finance company. Likewise, no proof was made that the inability of Ford to affiliate with a finance company places it in a competitively disadvantageous position. Since appellant did not attempt to show the facts held by the *Chrysler* case, *supra,* to be essential to the establishment of a claim for relief from the bar against affiliation, it should not be heard to complain that the district court refused to grant such relief.

The Government has proceeded with reasonable diligence in its suit to divorce General Motors from its affiliated finance company. Thus far the Government has been unsuccessful in its efforts to limit the use by defendants of discovery proceedings and force the case to trial. In the circumstances, it should require a showing of extreme hardship, which appellant has not made, to justify holding that the Government has forfeited its right to protect the public interest through lack of diligence.

ARGUMENT

I

THE INJUNCTIONS IMPOSED AGAINST APPELLANTS BY PARAGRAPHS 6 (i), 6 (k), AND 7 (d) OF THE DECREE BECAME FINAL UPON RETURN OF A GENERAL VERDICT OF GUILTY AGAINST THE GENERAL MOTORS GROUP UNDER PROPER INSTRUCTIONS TO THE JURY

In support of their contention that Paragraphs 6 (i), 6 (k), and 7 (d) of the decree should be suspended, appellants urge (1) that under Paragraph 12a of the decree Paragraphs 6 (i), 6 (k), and 7 (d) were to be suspended until such time as substantially identical injunctions were imposed against the General Motors Group, either by a decree or its "equivalent"; (2) that the "equivalent" of such a decree was defined as any agreement, act, or practice of the General Motor Group which the trial court, in its instructions to the jury in the then pending criminal antitrust suit held to constitute a proper basis for the return of a general verdict of guilty; (3) that the trial court in the *General Motors* case did not instruct the jury that the type of agreements, acts, and practices enjoined by Paragraphs 6 (i), 6 (k), and 7 (d) of the decree constituted, among others, a proper basis for the return of a general verdict of guilty, but on the contrary instructed that some of them were legal and proper; (4) that since the agreements, acts, and practices enjoined by Paragraphs 6 (i), 6 (k), and 7 (d) can be indulged by the General Motors Group, appellants are placed

in a position of competitive disadvantage with the General Motors Group; and (5) that in any event the agreements, acts, and practices enjoined by Paragraphs 6 (i), 6 (k), and 7 (d) of the decree do not constitute unreasonable restraints of trade.[10]

A. IN THE CRIMINAL PROCEEDINGS AGAINST THE GENERAL MOTORS GROUP, THE TRIAL COURT INSTRUCTED THE JURY THAT THE PRACTICE BY GENERAL MOTORS CORPORATION OF RECOMMENDING, ENDORSING, AND ADVERTISING GENERAL MOTORS ACCEPTANCE CORPORATION, ITS AFFILIATED FINANCE COMPANY, AS WELL AS THE PRACTICE OF JOINT SOLICITATION OF THE DEALERS BY AGENTS OF GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION, CONSTITUTED, ALONG WITH OTHER PRACTICES, A PROPER BASIS FOR THE RETURN OF A GENERAL VERDICT OF GUILTY

Appellants argue that the types of conduct enjoined by Paragraphs 6 (i), 6 (k), and 7 (d) of the decree, constitute nothing more than recommendation, persuasion, or endorsement, which are perfectly lawful, and that the trial court so held in its instructions to the jury in the criminal antitrust suit against the General Motors Group.[11]

The error in this reasoning lies in the fact that it ignores the impact of the trial court's charge to the jury when considered in its entirety. Appellants have isolated certain portions of the charge and have attempted to construe them separately and apart from their context. In failing to consider the instructions as a whole, they violate fundamental principles of construction. In *Mag-*

[10] Ford Brief 21–50; CIT Brief 25–50.

[11] Ford Brief 25–38; CIT Brief 25–40.

niac v. *Thomson*, 7 Pet. 348, 390, this Court, speaking through Mr. Justice Story, said:

> * * * In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the Court and the jury, at the time when it was delivered.[12]

We submit that the trial court's instructions, when considered as a whole, rather than piecemeal, do not lend themselves to the interpretation advanced by appellants. The Indictment charged that the General Motors Group had coerced or forced dealers selling General Motors cars to use the financing facilities of General Motors Acceptance Corporation; that this coercion had taken many and varied forms; that the dealers were peculiarly susceptible to the

[12] This rule has been followed consistently. See *Rhett* v. *Poe*, 2 How. 456, 481; *Insurance Company* v. *Transportation Company*, 12 Wall. 194, 203; *Spring Company* v. *Edgar*, 99 U. S. 645, 659; *New York, Lake Erie and Western Railroad Company* v. *Estill*, 147 U. S. 591, 614; *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668, 672; *Schaefer* v. *United States*, 251 U. S. 466, 471; *Boyd* v. *United States*, 271 U. S. 104, 107.

slightest pressures due to the weakness of their financial position as compared to that of the manufacturer and to their precarious contractual position with the manufacturer (R. 144–149).

The trial court did not discuss separately each and every means alleged in the indictment to force dealers to use the financing facilities of General Motors Acceptance Corporation; nor did he discuss specifically the evidence introduced in support of such allegations. He attempted to simplify the issues [11] by explaining the purpose of the antitrust laws (R. 92); by summarizing briefly the contents of the indictment without detailing all of the acts which it alleged (R. 93–96); and illustrated by a single example the type of conduct which would constitute an unreasonable restraint of trade (R. 98). The court explained that under the charge in the indictment, the evidence and the law, there were two primary issues of fact which the jury must decide; namely, whether the dealers were coerced, and

[11] The trial court's concept of his duty to the jury was stated clearly in his refusal to give instructions in the technical language proposed by counsel. He said (R. 115):

"My feeling about the duty of a Trial Judge in the decision of a jury question, my conception of the Judge's aid to the jury, is that it can be done and such aid can be rendered more efficiently by an oral charge which describes, in as simple terms as possible, the legal questions involved, and that I refrain, except as a last resort always, from giving to the Jury formal charges which become so involved in legal language and legal terms as to be of little aid to the Jury."

whether such coercion, if it did exist, constituted an unreasonable restraint of trade (R. 99, 101). The court said that the Government had a right to complain only if the defendants engaged in a sufficient number of the acts charged to constitute duress upon the dealers to achieve a result that otherwise would not have been accomplished, and to make the dealer do something that he would not have done of his own free will (R. 99). The court charged that the ultimate question in the case was whether the dealer could act as a free man (R. 99).

In an attempt to clarify the meaning of the word "coercion," the court compared the meaning of that word with the meaning of the words "exposition," "persuasion," and "argument." The court instructed that conduct which went no further than "exposition," "persuasion," or "argument" was proper and lawful, but that coercive conduct was unlawful (R. 100). The trial court did not, as claimed by the appellants, instruct the jury that any particular agreement, act, or practice constituted merely "exposition," "persuasion," and "argument," and hence did not constitute a violation of law. Such were issues of fact which the trial court properly left for determination by the jury. The jury's general verdict of guilty was a determination, under the trial court's instructions, that a sufficient number of the allegations in the indictment had been established by the evidence to constitute "coercion" and not

merely "exposition," "persuasion," or "argument." The jury was instructed that in arriving at a verdict it must consider all of the evidence (R. 97).

In a further attempt to illustrate and explain the meaning of the term "coercion," the trial court pointed out certain types of conduct which, standing alone, were not coercive and were not charged as such. In this connection the court said that it was not charged that in and of itself the mere recommendation to use General Motors Acceptance Corporation or the cancellation of a dealer's contract for just cause, or the mere ownership by the factory of a finance company was unlawful (R. 98–99).

If, under all of the instructions given, the jury had found that the acts charged and proved constituted nothing more than "recommendations," or "persuasion," or "exposition," or "argument," the only alternative would have been to return a verdict of acquittal. But, under the instructions given, the jury returned a general verdict of guilty. Hence, it must have found that the conduct charged and proved went beyond mere "recommendation," "persuasion," "exposition," and "argument" and constituted "coercion." Appellants admit that coercion is unlawful. Since a substantial part of the evidence introduced at the trial related to the coercion inherent in joint solicitation of the dealers by representatives of the factory and the affiliated finance company, who

"recommended" and "urged" that the dealers use the services of General Motors Acceptance Corporation, it is reasonable to assume that such evidence played an important part in the jury's return of a general verdict of guilty."

We submit that the trial court in instructing the jury in the criminal case against the General

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[14] The Circuit Court of Appeals discussed the coercive effect of joint solicitation in the *General Motors* case, saying (121 F. 2d at 394):

"At periodical meetings zone managers (GMSC) are instructed to secure dealers' use of GMAC finance and branch managers (GMAC) are told to enlist the aid of GMSC representatives in procuring dealers' use of GMAC credit. Manuals are distributed to GMAC and GMSC personnel directing full cooperation in order to obtain dealers' patronage for GMAC, and the two sets of reports (the 10-day and 30-day reports made to GMSC, and the 5154 and 5171 reports made by GMAC) are inter-changed between the parallel organizations.

"If GMAC records indicate that a particular dealer is not financing a sufficient percentage of his time sales with GMAC, the aid of the zone manager of the proper sales unit is requested. The zone manager has authority to cancel a franchise contract, subject to confirmation by the regional manager, and controls the distribution of cars in times of car shortage and in periods of overproduction. Thereafter, a representative of GMAC and the zone manager make a joint call on the dealer for the purpose of securing the additional patronage for GMAC.

"Every year dealers attend contract renewal meetings where they are interviewed by GMAC representatives in connection with the manner of financing cars. Unless the dealers' use of GMAC has been satisfactory during the preceding year, he is unable to secure the approval of the GMAC representative. In such cases the signing of his contract is postponed indefinitely by the zone manager until such time as the dealer makes satisfactory commit-

Motors Group as to what agreements, acts, or practices would constitute a proper basis for the return of a general verdict of guilty, included, as a part of such instructions, and in their proper relation to all of the evidence and the charges in the Indictment, the type of conduct enjoined by Paragraph 6 (i), 6 (k), and 7 (d) of the decree herein.[15] Since, under the Ford decree, such in-

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ments for the coming year with respect to financing with GMAC. * * *

"Obviously, such evidence as related above tends to disclose the tremendous influence exerted by appellants over dealers with respect to their use of GMAC."

After discussing several other types of evidence, the court concluded with the statement (p. 397) that:

"It is clear that the evidence in this case tends to show a conspiracy having as its purpose the control by appellants of the dealers' financing. * * * The jury could have interpreted the testimony in the light of all the circumstances, and it was proper for the jury to rely on inferences naturally flowing from the whole evidence * * *

"It is even plainer that the jury finding of coercion is supported by the evidence. The coercive practices were many and varied (not all detailed in this opinion), and directly aimed to compel dealer-purchasers to use GMAC in financing the wholesale purchase and retail sale of General Motors cars. These practices occurred often and with sufficient continuity to constitute a definite course of business conduct. Undoubtedly the jury was warranted in attaching the coercion label to the action thus adopted by the appellants."

[15] Paragraph 58 of the Indictment (R. 148) alleged that one of the means employed by the defendants to force dealers to use the services of the factory-affiliated finance company, was to endorse and recommend such finance company. It reads: "To advertise, endorse, recommend and

structions were to be considered as the equivalent of a decree enjoining the General Motors Group from engaging in such practices, and since appellants were to be bound only to the extent that the General Motors Group was bound (R. 35–37), the injunctions imposed against appellants by Paragraphs 6 (i), 6 (k), and 7 (d) became final when the general verdict of guilty was returned against the General Motors Group on November 17, 1939, under the instructions given.

B. IN VIEW OF THE DEALERS' READY SUSCEPTIBILITY TO FACTORY INFLUENCE, THE PRACTICE OF RECOMMENDING A FACTORY-FAVORED OR FACTORY-AFFILIATED FINANCE COMPANY, AS WELL AS THE PRACTICE OF JOINT SOLICITATION OF DEALERS BY AGENTS OF THE FACTORY AND OF THE FAVORED FINANCE COMPANY, CONSTITUTE COERCION AND HENCE VIOLATE THE SHERMAN ACT

Appellants insist that, regardless of the legality of such conduct, they by bargain won the right to engage in joint solicitation and have the manufacturer's stamp of approval placed on its favored finance company. It seems to us anomalous that appellants should expect a court of equity to free them of any part of the hazards attendant upon the commission of illegal acts. We believe it to be plainly demonstrable that the practices in which appellants seek to engage, when viewed against the factual background of the industry, are clearly illegal.

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promote, and to coerce and require dealers to advertise, recommend and promote, the use of the automobile financing services, plans and facilities of General Motors Acceptance Corporation."

Although the formal contractual relationship between the dealer and the factory is not one of agency, but rather one in which the dealer is an independent contractor, nevertheless the factory insists upon controlling and supervising virtually all of the business operations of the dealer without assuming any of the liabilities normally incident to an agency relationship.[16]

The precarious contractual position occupied by the dealers in relation to the manufacturer, as well as their notoriously weak economic condition, makes the dealers peculiarly susceptible to the slightest pressure from the factory. Each dealer is required to make a substantial investment as a condition precedent to securing a franchise authorizing such dealer to purchase and sell cars. The factory requires that all cars purchased by the dealer must be paid for in cash before shipment from the factory. The dealer's contract runs for one year only and is subject to cancellation on short notice and without cause. The dealer's substantial investment will be lost unless he can continue to buy and sell cars. In addition, the manufacturer has a monopoly on the supply of cars.[17] Since the dealer's business existence is based upon a one-year contract which

[16] See footnote 2, p. 7, *infra*. The same relationship exists between Ford and its dealers and between Chrysler and its dealers.

[17] The court in the *General Motors* case discussed the manner in which the manufacturer uses its car monopoly to

places no substantial contractual obligation on the manufacturer, and since such contract is cancellable on short notice and without cause, it is indeed a hardy dealer who would risk commercial suicide by choosing freely a financing medium in the face of an *endorsement* and *recommendation* by the factory of a particular finance company, and in the face of *joint solicitation* by agents of the factory and such finance company.

The success of such endorsement and recommendation through joint solicitation in securing the dealer's use of the financing facilities of the factory-favored finance company was discussed fully and illustrated clearly in the decision of the Seventh Circuit Court of Appeals in the *General Motors* case.[18] In summarizing the position of the dealer in reference to his lack of free choice in selecting a finance medium, that court said (p. 401):

> As matters now stand, some 15,000 dealers are graciously allowed to continue

force dealers to use the finance services of its affiliate. It said (p. 402):

"In the instant case General Motors Corporation and the other conspirators made use of their monopoly over the supply of General Motors cars and their power over the economic fate of General Motors dealers, to force GMAC on dealer-purchasers and retail purchasers of General Motors cars, in effect tying the GMAC finance conditions and restrictions to the wholesale purchase and retail sale of General Motors cars. * * *" See also the Ford complaint (R. 1-13).

[18] See footnote 14, pp. 30-31, *infra*.

> their business of purchasing and selling General Motors cars in return for their slavish obedience to the command of the appellants to use the GMAC finance service. We should not tolerate a control mechanism definitely calculated to make General Motors dealers independent in name only. The best security to the public lies in the immediate removal of the finance restrictions. Then the dealer-purchasers and retail purchasers of General Motors cars may choose the finance service they desire, and the discrimination against would-be purchasers of General Motors cars (those who are now ineligible under GMAC terms, dissatisfied with GMAC service, or desirous of using an independent finance service) would disappear.

Appellant Ford argues (Br. 30–35) that it will not coerce its dealers to use the financing facilities of respondent finance company; that it merely wishes to "persuade" them to use such facilities; that other injunctive provisions of the decree, against which they seek no relief, prevent coercive conduct; that Paragraph 6 (h) enjoins Ford from cancelling or threatening to cancel a franchise for failure to patronize a preferred finance company; that Paragraph 6 (f) enjoins Ford from discriminating among its dealers for the purpose of influencing a dealer to patronize a preferred finance company.

It is pertinent to inquire as to what appellant Ford means by the term "persuade." Certainly Ford expects its dealers "to be persuaded," else it would not seek modification of the decree. If any particular method of "persuasion" fails, other methods of "persuasion" presumably would be employed. If Ford is permitted to "persuade" its dealers to use a preferred finance company, it will find a way to make "persuasion" effective. The difference between a threat and "persuasion" may involve such finely-drawn subleties of language and conduct as to make the two indistinguishable. This is particularly true in a situation such as is involved here, where the dealer is peculiarly subject to the slightest hint from the factory.

We submit that under the peculiar relationship existing between the factory and the dealer, recommendation and endorsement by the factory of a particular finance company and joint solicitation of a dealer by agents of the factory and such finance company, constitute in and of themselves coercive conduct condemned by the Sherman Act, since such practices operate to force unreasonable terms on independent traders and unduly limit their liberty to do business. See *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 78; *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 598; *Binderup* v. *Pathé Exchange*, 263 U. S. 291, 312; *Loewe* v. *Lawlor*, 208 U. S. 274, 293–294; *United*

States v. *Patten*, 226 U. S. 525, 541. The Seventh Circuit Court of Appeals in the *General Motors* case so indicated (121 F. 2d at 394–397, 402–403). However, we need not stand on such a position. Even if we were to concede, for the sake of argument, that such conduct, standing alone, is lawful, it becomes unlawful when directed toward achieving an unlawful purpose and when pursued along with other means which are clearly unlawful. The entire plan may make the parts unlawful. *Aikens* v. *Wisconsin*, 195 U. S. 194, 195; *Swift and Company* v. *United States*, 196 U. S. 375, 396; *United States* v. *Reading Co.*, 226 U. S. 324, 358; *United States* v. *Patten*, 226 U. S. 525, 543; *Duplex Co.* v. *Deering*, 254 U. S. 443, 465. In framing a decree under the antitrust laws a court of equity may use its power "to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 724. But whether the conduct enjoined by Paragraph 6 (i), 6 (k), or 7 (d) of the decree be considered lawful or unlawful when viewed in isolation, or whether it be considered as unlawful because used to further an illegal purpose, the issue of legality was foreclosed when the conditional decree became absolute by the return of a general verdict of guilty against the General Motors Group under appropriate instructions to the jury, and the court below so found (R. 158–160).

C. THE DISTRICT COURT WAS CORRECT IN FINDING THAT APPELLANTS ARE NOT LABORING UNDER ANY COMPETITIVE DISADVATAGE WITH THE GENERAL MOTORS GROUP IN THE MANUFACTURE, SALE, AND FINANCING OF FORD CARS, AS A RESULT OF THE INJUNCTIONS CONTAINED IN PARAGRAPHS 6 (i), (6) (k), AND 7 (d) OF THE DECREE, AND IN FINDING THAT APPELLANTS OFFERED NO EVIDENCE SHOWING COMPETITIVE DISADVANTAGE

Appellants contend that the finding by the district court that they are laboring under no competitive disadvantage as against General Motors in the manufacture, sale, and financing of Ford cars by virtue of the injunctions contained in Paragraphs 6 (i), 6 (k) and 7 (d) of the decree, as well as the finding that appellants offered no evidence showing competitive disadvantage, are immaterial, since the conditions governing the finality of such injunctions have not been met. They contend further that such findings are erroneous since appellants are in fact laboring under a competitive disadvantage.[19]

Under the decree appellants are entitled to a suspension of Paragraphs 6 (i), 6 (k) and 7 (d) *only* if the trial court in instructing the jury in the *General Motors* case failed to instruct that the practices therein described, among others, constituted a proper basis for the return of a general verdict of guilty in that case. If our argument in the preceding sections of this brief is correct, the trial court did not fail so to instruct and the General Motors group can not legally engage in such practices. The Chrysler Group is expressly

[19] Ford Brief 42–46; CIT Brief 43–46.

enjoined from engaging in such practices by an identical decree entered on the same day as the Ford decree.[20] These two groups together with Ford manufacture and sell approximately 90 per cent of all cars manufactured and sold in the United States (R. 124A). Consequently, continuation of the injunctive provisions against Ford can result in no competitive disadvantage.

In support of their contention that they are in fact laboring under a competitive disadvantage with the General Motors Group, appellants assert (1) that Ford's percentage of the total number of cars sold in the United States declined during the period 1936–1940; (2) that CIT has lost Ford finance business to banks and other lending agencies since entry of the decree in 1938; and (3) that CIT's Ford dealer market for financing cars has decreased in the same proportion as the decrease in sales of Ford cars.

Although insisting that it is laboring under a competitive disadvantage with General Motors as a result of the prohibitions in Paragraphs 6 (i), 6 (k), and 7 (d) of the decree, Ford admits (Br. 47) that the record does not show the loss by Ford to General Motors of any particular sales as a result of Ford's inability to make joint visits with and recommend a finance company.

The only indication in the record showing Ford's inability to compete with General Motors

[20] See *United States* v. *Chrysler Corporation*, Civil No. 8, N. D. Ind. (316 U. S. 556).

consists of a chart attached to an affidavit filed in support of the motion to modify (R. 124A). This chart shows the relative percentage of the total car market occupied by Ford during the period 1932–1940, inclusive. It indicates that Ford's percentage participation in the market increased 23.9 percent in 1932 to 30.2 percent in 1935, and that it decreased to 18.9 percent by 1940. It would strain credulity to insist that this loss in total sales resulted from Ford's inability to recommend a finance company, or to make joint visits with such company and recommend it to dealers. The reasons for shifts in market position from year to year in any business are varied and frequently difficult to explain. Vigor of the respective selling organizations, the changing preferences of the buying public with respect to type, design, and performance, and other considerations, combine to cause variances in total industry position. Certainly Ford cannot insist, nor does its chart prove, that its loss of business during the period 1936–1940, inclusive, was due wholly, or even in part, to its inability to control the financing medium of its dealers.

In *Chrysler Corporation* v. *United States,* 316 U. S. 556, 564, this Court, in construing a decree identical to the one under review here, said that if Chrysler felt that its inability to affiliate with a finance company would place it in a position of competitive disadvantage with its competitors it should have made such a showing to the district

court.[21] Chrysler had made no such showing. Ford made none here. Ford not only failed to prove any actual competitive disadvantage but enjoys equality of competitive opportunity with General Motors under the terms of the decree.

Ford argues (Br. 49–50) that it should be permitted to recommend a finance company to its dealers for the purpose of protecting its good will, since cars are sold at places licensed to display Ford's trademark. It argues that the practices of the finance company to whom the dealer sells his retail time sales paper will determine whether a customer will come back when he wants to buy a new car; that some finance companies make high charges for extensions of maturity and insurance renewals and repossess cars without adequate notice; that dealers do not often select finance companies on the basis of the service such companies offer the customer, but select the company which will offer the dealer the best rebate in return for his patronage.

Admittedly, Ford has a legitimate interest in protecting the good will of its products. We submit, however, that an attempt by Ford to dictate the concern with whom the dealers may finance cars owned and sold by the dealers goes beyond the permissible limits of protecting the manufacturer's good will. Under his contract with Ford,

[21] The specific decree modification sought in the *Chrysler* case was the same as that discussed herein under Point II, *infra*.

the dealer is not an agent but an independent contractor. He owns the car which he sells on time, since Ford requires that he pay cash for the car before it is shipped from the factory to the dealer's place of business. Ford cannot, under the guise of protecting the good will of its trademark, control the whole process of distribution.

The same argument was advanced by General Motors in its appeal from the convictions in the criminal case. In disposing of this defense the Seventh Circuit Court of Appeals said (p. 400):

> * * * No doubt it is proper for GMC and GMSC to promote manufacturer's goodwill and to protect the manufacturer against inefficient and unscrupulous dealers. * * * But there is a limit to how far a manufacturer may go to control the whole process of distribution. The jury found that the appellants had gone too far with their control plans, and we are inclined to approve and to indorse the jury finding.

Under the decree, however, Ford is not without ability to protect the good will of its trademark. While Paragraph 6 (k) of the decree prohibits Ford from recommending, endorsing, or advertising appellant finance companies or any particular finance company to its dealers, the proviso clause does permit Ford to adopt a plan or plans of its own for financing retail sales of cars, and permits Ford to recommend the use of such plans to its dealers, as well as to advertise and recom-

mend to the public the use of such plans." We submit that this exception to the prohibitions contained in Paragraph 6 (k) of the decree gives Ford ample opportunity to protect its good will. To permit it to go further and insist that its dealers must use the services of a particular finance company designated by Ford would do violence to the independent legal status of the dealers.

Appellant finance companies also argue (Br. 41–48) that to the extent that Ford is at a competitive disadvantage, they are under the same disadvantage, and that failure of the Government to obtain injunctions against the General Motors Group similar to those in Paragraphs 6 (i), 6 (k), and 7 (d) of the decree has the effect of discriminating against them. As in the case of Ford, appellant finance companies offered no proof in the District Court to show either competitive disadvantages or discrimination.

Appellant finance companies reason (Br. 44–45) that since the volume of sales of General Motors

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[2] The proviso clause in Paragraph 6 (k) reads as follows (R. 30):

"provided, however, that nothing in this decree contained shall prevent the Manufacturer in good faith:

"(1) From adopting from time to time a plan or plans of financing retail sales of new automobiles made by the Manufacturer or from time to time withdrawing or modifying the same;

"(2) From recommending to its dealers the use of such plans;

"(3) From advertising to the public and recommending the use of such plans."

cars has increased since entry of the decree, while Ford sales have decreased, the available market of cars which might be financed by them has decreased to their obvious economic disadvantage. They argue further (Br. 45–46) that their Ford financing business has diminished substantially since entry of the decree in 1938; that thousands of commercial banks located throughout the United States, which previously were not engaged in automobile financing, have now entered the field; and that this new competition has diminished their Ford finance market.[23] This assumes that appellant finance companies are entitled to the Ford dealers' finance market regardless of their ability to secure a fair share of such market competitively.

The argument amounts to an admission that the decree has had the effect it was intended to have; namely, the creation of competition in the financing of Ford cars. Appellant finance companies admit that they have lost Ford financing business to banks and other lending agencies since entry of the decree. Having lost business to competitors in a free market, they now seek to recapture it by the substitution of the previously existing protected market. They are asking this Court to protect them from the ravages of competition by restoration of the non-competitive, discriminatory,

[23] The same reasons were advanced as a part of their motion to modify (R. 195–196).

status quo ante. They are asking this Court to approve a combination between them and Ford under which appellant finance companies will be forced on Ford dealers whether or not such dealers desire to employ such financing services. They seek this Court's blessing on a type of combination which the Seventh Circuit Court of Appeals in the *General Motors* case held was clearly illegal, and which holding this Court twice declined to review.

We submit that a suspension of Paragraphs 6 (i), 6 (k), and 7 (d) of the decree will assist materially in recreating those conditions which the suit was designed to eliminate and which the courts have declared to be illegal. We think it is clear that Ford is attempting, through these motions, to regain the privilege of dictating to its dealer organization the finance company with which its dealers must do business. We think it is equally clear that appellant finance companies are seeking, through such motions, to recapture the non-competitive market which they once enjoyed.

II

IN GRANTING APPELLEE'S MOTION FOR EXTENSION OF THE BAR AGAINST AFFILIATION, THE COURT BELOW APPROPRIATELY EXERCISED ITS EQUITY JURISDICTION

As indicated previously, the Government filed a motion seeking an extension of the bar against affiliation to January 1, 1947 (R. 66–71). Appel-

lant Ford moved that such bar be lifted permanently (R. 76–91).[24]

In support of its contention that the bar against affiliation should be lifted, Ford urges (1) that under the terms of Paragraph 12 of the decree Ford is entitled to an *automatic* termination of such bar unless the Government succeeded in divorcing General Motors Acceptance Corporation from General Motors Corporation by a day certain; (2) that this was an express condition to be effective notwithstanding any other provisions of the decree; (3) that the Government has not yet succeeded in divorcing General Motors Acceptance Corporation from General Motors Corporation; (4) that the Government has not been diligent in disposing of its divestiture suit against the General Motors Group and made no showing of such diligence; and (5) that Ford is under a competitive disadvantage with General Motors as a result of the bar against affiliation and established this fact in the court below (Br. [redacted]–66).

Paragraph 12 of the decree enjoins Ford from purchasing the securities of a finance company; from making a loan to a finance company; from accepting a commission from a finance company on account of retail time sales paper acquired by that company from Ford dealers; and from paying any money to a finance company for the purpose of inducing such company to lower its finance

[24] Appellants in the CIT Group did not join in this motion.

charges unless similar payments are made available to other finance companies (R. 34). Ford's motion is directed only to the injunction preventing Ford from owning or purchasing an interest in a finance company (R. 76).

While Paragraph 12 of the decree was to become effective immediately upon entry of the decree, its ultimate binding effect was to be determined by the outcome of civil proceedings to be instituted against the General Motors Group. The restrictive effect of Paragraph 12 was to be lifted unless the Government obtained a final decree not subject to further review permanently divorcing General Motors Acceptance Corporation from General Motors Corporation by January 1, 1941. The Government filed such a suit against General Motors Corporation on October 4, 1940.[25] The suit is still pending. Five annual extensions of the time clause provided by Paragraph 12 were secured by consent (R. 42–65), extending the bar against affiliation to January 1, 1946 (R. 64–66). Ford refused the Government's request for a further extension to January 1, 1947.

A. IN THE ABSENCE OF AFFIRMATIVE PROOF OF COMPETITIVE DISADVANTAGE TO FORD, IT WAS WITHIN THE PROVINCE OF THE DISTRICT COURT TO EXTEND THE BAR AGAINST AFFILIATION

The precise question to be considered in this portion of the brief was before this Court in

[25] *United States* v. *General Motors Corporation, et al.*, Civil Action No. 2177, N. D. Ill., E. D.

Chrysler Corporation v. *United States*, 316 U. S. 556. In that case Chrysler, which was subject to a decree identical to the Ford decree, resisted extension of the bar against affiliation to January 1, 1943.[26] Both the majority and the dissenting opinions agreed that the district court had power to modify the decree in the manner requested in order to effectuate the purposes of the decree, not only because of the powers inherent in a court of equity (see *Swift & Co.* v. *United States*, 276 U. S. 311; *United States* v. *Swift & Co.*, 286 U. S. 106, 114; *United States* v. *International Harvester Co.*, 274 U. S. 693), but because of the express reservation of the power to modify contained in paragraph 14 of the decree. The sole issue upon which this Court divided was whether the district court had abused its discretion in granting the Government's motion for modification.

The court held that the primary purpose of the decree was to have the ultimate rights of the parties thereunder determined by the civil antitrust proceedings against General Motors and that the time limitation was inserted to protect Chrysler from competitive disadvantage in the event that the Government should be dilatory in

[26] Chrysler unsuccessfully resisted the Government's first application for an extension of the bar from January 1, 1941, to January 1, 1942. Its appeal to this Court was dismissed for want of a quorum of Justices qualified to sit. *Chrysler Corporation* v. *United States*, 314 U. S. 583, rehearing denied, 314 U. S. 716.

prosecuting the injunctive proceedings against General Motors (316 U. S. at 563).[27] It agreed with the district court that the Government had not lost the right to seek modification through lack of diligence in proceeding against General Motors and held that the crux of the question was "whether the extension of the ban on affiliation contained in paragraph 12 places Chrysler at a competitive disadvantage" (*id.*). The Court said, "if Chrysler desires to affiliate with a finance company and feels that its inability to do so places it at a disadvantage with its competitors, it should make such a showing to the District Court" (*id.*, p. 564). Since Chrysler had adduced no evidence in support of its claim of competitive disadvantage, the Court ruled that the district court had not abused its discretion in granting the Government's application for extension of the bar against affiliation.[28]

In this case, paragraph 12 of the Ford decree, entered under the same circumstances, containing the same language, and construed by the district

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[27] The ruling affirmed verbatim the finding of the district court. Precisely the same finding was made in the case at bar (R. 160).

[28] The minority took the view that the burden was on the Government to establish by affirmative proof the necessity for modification of the decree. Since they were of the opinion that the Government had not proceeded against General Motors with the required degree of diligence, they concluded that the order of the district court was not within the proper limits of its discretion (316 U. S. at 571).

court in the same manner as the *Chrysler* decree, is before this Court. We submit that the *Chrysler* decision disposes of all questions here raised except whether the court below erred in holding that Ford had not shown that it was under a competitive disadvantage by reason of being barred from affiliation with a finance company while the civil proceeding against General Motors is pending. Since the purpose of the time limitation was to protect Chrysler and Ford from competitive disadvantage in the event that the Government was dilatory, it is clear that "competitive disadvantage" is "the controlling factor", as this Court stated in the *Chrysler* case (316 U. S. at 563). Appellant's insistence that, contrary to the finding of the court below (R. 158), the Government has not proceeded diligently against General Motors raises only a subsidiary question, but one which we shall show is without substance.

B. FORD PRESENTED NO PLAN TO THE DISTRICT COURT FOR AFFILIATION WITH A FINANCE COMPANY AND OFFERED NO PROOF THAT SUCH AFFILIATION WAS NECESSARY TO AVOID UNFAIRNESS

The record is barren of any intimation that Ford had any present or future intention of acquiring an interest in a finance company. In fact, appellant concedes (Br. 65–66) that it had formulated no such plans and urges that it was improper for the court below to expect it to submit a plan. As a consequence, appellant's argument that it is suffering a competitive disadvantage through its

inability to do that which it shows no intention of doing is surrounded by a certain aura of unreality.

The only effort which appellant makes to bolster up its *a priori* argument on competitive disadvantage is by reference to the chart attached to an affidavit filed in support of its motion (Br. 64–65). All that that chart shows is that since 1936 Ford's percentage of participation in the total car market has decreased from 30 percent to 19 percent. By *post hoc, ergo propter hoc* reasoning appellant insists that it has demonstrated that inability to affiliate with a finance company has placed it at a competitive disadvantage. What has been said at pages 39–43, *supra*, in regard to the same argument applies with equal force to repetition of the argument at this point. No other facts are urged as demonstrating competitive disadvantage.

Under these circumstances we submit that the District Court was correct in finding that Ford offered no evidence that further extension of the bar against affiliation would place it at a competitive disadvantage with General Motors, and in finding further that an extension of the bar for one year would not place Ford at a competitive disadvantage (R. 160).

The court below concluded as a matter of law "that the purpose and intent of the decree will be carried out if Ford Motor Company is given

the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such a plan is necessary to prevent Ford Motor Company from being placed at a competitive disadvantage during the pendency of complainant's civil litigation against General Motors Corporation" (R. 161). This conclusion offers appellant the exact opportunity to protect its rights which this Court approved in the *Chrysler* case (316 U. S. at 563). Since appellant chose to ignore the explicit directions of this Court as to the appropriate basis upon which to formulate a claim for relief, it should not be heard to complain that the district court denied a claim based on nothing more than a construction of the decree at odds with the principles announced in the *Chrysler* decision.

C. THE GOVERNMENT HAS PROSECUTED THE DIVESTITURE SUIT AGAINST THE GENERAL MOTORS GROUP WITH REASONABLE DILIGENCE

Appellant Ford insists (Br. 61–64) that the Government has not been diligent in requiring General Motors to part with General Motors Acceptance Corporation and made no showing of such diligence; that in the *Chrysler* case (316 U. S. 556) the Government offered in evidence a transcript of the proceedings in the civil suit against General Motors but no such transcript was offered here; and that the Government made no adequate showing of diligence in the prosecu-

tion of General Motors between January 15, 1942 (the date of the last step shown by the record in the *Chrysler* case) and December 31, 1945.

The various procedural steps taken in the divorcement suit against the General Motors Group during the period from the entry of the decree herein on November 15, 1938, to January 15, 1942, are a part of the record in *Chrysler Corporation* v. *United States*, No. 1036, October Term, 1941, and hence are a matter of record in this Court.[30] That record was discussed in this Court's opinion in the Chrysler case (316 U. S. 556, 559–562), and was held sufficient to justify the District Court's finding of due diligence by the Government as of the date when such finding was made.

In the affidavit supporting our motion in the court below (R. 69–70) we detailed the steps taken subsequently. The affidavit recites that the Government has been engaged continuously in the taking of depositions *at the demand of General Motors Corporation* throughout all sections of the United States; that approximately 220 depositions had been taken in the case by July 9, 1945; and that General Motors had indicated an intention to take depositions of approximately 200

[30] The same information was a matter of record in the court below because the *Chrysler case* originated in that court.

more witnesses.[31] The motion and affidavit recited further that on July 9, 1945, in an effort to limit the taking of further depositions and bring the case to trial, the Government filed a motion in the District Court to vacate or limit notices to take any further depositions; that such motion was argued; and that no ruling was made thereon.[32]

Participation in the taking of more than 400 depositions in all parts of the country, together with the Government's effort to end this phase of the case so that the trial might commence, should suffice to show that the Government has been reasonably diligent in attempting to dispose of the case during the period under discussion. The court below realized that, as a practical matter, the Government's hands were tied. In view of this fact, it found (R. 158) that the Government had proceeded diligently and expeditiously in prosecuting the divestiture suit against the General Motors group. A contrary finding would have resulted in forfeiture of the Government's right and duty to protect the public interest in this suit by reason of its inability to persuade a district court that limitations should be imposed on the use by other litigants of the discovery procedure afforded by the Federal Rules of Civil

[31] From July 9, 1945, to date approximately 200 additional depositions have been taken, making a total of more than 400 depositions taken. (*United States* v. *General Motors Corporation et al.*, Civil No. 2177, N. D. Ill., E. D.)

[32] Subsequently, in August 1946, the Government renewed its motion, which was denied by the District Court. *Ibid.*

Procedure. We submit that nothing short of a clear demonstration of great hardship—which appellant certainly has not made—should persuade this Court to repudiate the finding of the court below.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

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